



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
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Re: Harvey and Knotts Drum Site
EPA Docket No. III-93-001L

Dear Counsel:

I enclose your copies of the probable cause determination in this matter. I have filed the original determination with the Regional Hearing Clerk.

Please call me at (215) 597-9853 if you have any questions regarding this determination or procedural aspects of this matter. If you would like to discuss the merits of the matter with me, please arrange to have opposing counsel participate in the discussion.

Thank you for your cooperation in this matter.

Very truly yours,

Benjamin Kalkstein

BENJAMIN KALKSTEIN

Regional Judicial and Presiding Officer

Enc.

cc: Regional Hearing Clerk (3RC00)
Regional Counsel

EPA Docket No. III-93-001L

the Agency affords an opportunity to present evidence and to be heard to property owners when it files lien notices.

Although the case is not binding law in Region III (Third and Fourth Circuit Courts of Appeal), at least one court has decided that the Agency must provide some procedural safeguards to property owners whose property may be subject to CERCLA Federal Liens. Under Reardon v. United States, 947 F. 2d 1509 (CA 1, 1991),...the minimum procedural requirements would be notice of an intention to file a notice of lien and provision for a hearing if the property owner claimed that the lien was wrongfully imposed...EPA may only need to demonstrate probable cause or reason to believe that the land would be "subject to or affected by" a cleanup, or that the landowner was not entitled to an "innocent landowner" defense. 947 F. 2d 1522.

PROCEDURAL HISTORY

The Harvey and Knotts Drum Site was an open dump and burning ground during the 1960's, used for the disposal of paint pigments, sludges and solvents containing hazardous substances and other materials. In 1982 EPA discovered rusted and leaky drums at the Site. EPA installed a security fence and overpacked 43 deteriorated drums. In 1984 EPA transported the 43 overpacked drums to an approved disposal facility and characterized and consolidated approximately 700 more drums in the fenced area at the Site. In 1985 EPA determined the appropriate remedy for the Site (and in 1992 EPA amended that determination).

This proceeding was initiated under Federal CERCLA Lien Procedures issued August 5, 1992 by the Regional Counsel for EPA's Region III. By letter dated April 19, 1993, EPA notified Ms. Edna J. Knotts of EPA's intent to file a notice of Federal Lien on her property in Glasgow, Pencader Hundred, New Castle County, Delaware. Ms. Knotts' May 11, 1993 letter responding to EPA's April 19, 1993 notice of intent to file lien, triggered the June 8, 1993 assignment of the Regional Judicial and Presiding Officer to preside over the lien proceeding. In accordance with the Region III procedures EPA filed its Reply to Ms. Knotts' May 11, 1993 letter on July 26, 1993, together with the administrative record of the lien. By letter dated July 28, 1993, the Regional Judicial and Presiding Officer scheduled a conference call among the parties' representatives for August 24, 1993.

By memorandum dated July 29, 1993 EPA's Enforcement Counsel for Superfund and Director of Waste Programs Enforcement issued Supplemental Guidance on Federal Superfund Liens (OSWER Directive No. 9832.12-1a). Although the Region III procedures govern this proceeding, the Presiding Officer has striven to assure that no part of this proceeding is inconsistent with OSWER Directive No.

9832.12-1a.

In a series of telephone discussions late in August of 1993, counsel for the parties concluded that the parties did not desire to make additional written submissions or oral presentations, and agreed to have the matter decided on the basis of the record and the written submissions already made. Accordingly, the Regional Judicial and Presiding Officer has reviewed the administrative record and the parties' submissions. The issue is whether EPA had probable cause, or a reasonable basis to believe it appropriate, to file a notice of CERCLA Federal Lien on Ms. Knott's property on March 26, 1990.

THE PARTIES' POSITIONS

Ms. Knotts' submission argues that (1) the lien notice was inappropriate in scope and should cover only a portion of Ms. Knotts' 41.24-acre property; (2) the value of Ms. Knotts' property is unnecessary for recovery by EPA of its costs incurred in connection with the Harvey & Knotts Drum Superfund Site; and (3) Ms. Knotts' property subject to the lien is a major portion of her assets, and the filing of the lien notice has made the property unsalable, leaving her with a financial hardship through no fault of her own.

In its Reply EPA provided a clear and detailed summary of the relevant facts in this matter, which are not in dispute, and responded to each of the arguments made on behalf of Ms. Knotts. As to the argument that the lien was inappropriately overbroad, EPA cited portions of the legislative history of CERCLA § 107(1) showing Congress' intent that CERCLA Federal liens should apply to the title of the entire property on which a response action was taken, but not to the title of other property held by the responsible party. H.R. Rep. No. 253(III), 99th Cong., 2d Sess. 18 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 3038, 3041. In response to Ms. Knotts' argument that the value of the property involved will be unnecessary for EPA's cost recovery, EPA admits that certain other responsible parties have made payments to EPA pursuant to negotiated consent decrees, but points out that costs will continue to be incurred, and those costs have not been fully addressed yet. In addressing this point, EPA attached to its Reply Exhibit E, a copy of an April 4, 1992 EPA letter to the U.S. Department of Justice. I have not considered this document in determining this matter because it postdated the filing of the lien notice and is thus irrelevant to this determination.²

² Since the issue in this matter is whether EPA had probable cause to file the lien notice in March of 1990, information and documents that developed or written after that are generally

FACTS

The relevant, undisputed facts are:

1. Ms. Edna Knotts, a "person" as defined in section 101 (21) of CERCLA, 42 U.S.C. § 9601 (21), is, was in March 1990, and has been the sole owner of property on which the Harvey and Knotts Drum Site is located since September 28, 1979. (Administrative Record Documents 1 and 2). Before that date, she was part owner of the property. As owner of the Site, Ms. Knotts is a potentially responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).
2. EPA has incurred response costs associated with the Harvey and Knott Drum Site since March of 1982. (Administrative Record Documents 12, 13, 14; EPA Reply Exhibit D).
3. The Harvey and Knotts Drum Site was placed on the CERCLA National Priority List (NPL) in September of 1984. (Administrative Record Document 16).
4. Ms. Knotts' property is, and was in March 1990, subject to or affected by a removal and a remedial action. (Administrative Record, generally).
5. Ms. Knotts was provided with written notice of potential liability by letters dated May 24, 1982, August 19, 1982 and January 17, 1983. (Administrative Record Documents 3, 4 and 7.)
6. The liability for EPA's costs has, and had not in March 1990 not been fully satisfied nor has it become unenforceable through operation of the CERCLA statute of limitations. (EPA Reply Exhibit D).

DISCUSSION

A. OVERBROAD NOTICE

The deed contained in the administrative record of lien filing (Document No. 1) describes the property involved in this proceeding. That deed was specifically referenced in the EASEMENT AND USE AGREEMENT of April 7, 1987 (Document No. 2) and there the property was described as: "...tax parcel NO. 11-035-00006, which property was conveyed to Grantor" (Mrs. Edna Knotts) "by deed recorded in the office of the recorder of deeds of New Castle County, Delaware, in Deed Book 0107, Page 54, more particularly

irrelevant to this determination.

EPA Docket No. III-93-001L

consisting of 41.24 acres of land on the south side of Frazed Corner Road (State Route 395), Pecander Hundred, New Castle County, Delaware." This document tends to show that the parties agreed in 1987 that the entire 41.24 acre parcel would be affected by the response action, although the primary focus of the response action would be the Harvey & Knotts Drum Site. There is in the record neither a logical reason for, nor a parcel description of, any alternative parcel that should be subject to the CERCLA Federal Lien.

B. PROPERTY NOT NECESSARY FOR EPA COST RECOVERY

This argument is speculative and unsupported by the information contained in the Administrative Record. There is pending in the District Court for the District of Delaware a CERCLA cost recovery action (Civil Action No. 88-341) brought by the United States against Chrysler Corporation and Knotts, Inc., two potentially responsible parties. (Administrative Record Documents 20, 21). The outcome of this action is unknown. Although it is possible that this case, together with the Consent Decree in the Government's case against General Motors Corporation and Harvey & Harvey (Civil Action No. 87-464, Administrative Record Document 19), will result in the complete reimbursement of EPA's costs, there is no way to be certain of this. Satisfaction of the Government's claims would release Ms. Knotts' property from the CERCLA Federal Lien under Section 107(1) of CERCLA, 42 U.S.C. § 9607(1). Until the claims have been satisfied, however, the lien continues to exist, and withdrawal of the lien notice is inappropriate.

C. FINANCIAL HARDSHIP

Ms. Knotts' financial difficulties seem to be of the same nature as those anticipated by EPA to warrant filing of a lien notice in its applicable policy:

"Filing of notice of the federal lien will be particularly beneficial to the government's efforts to recover costs in a subsequent Section 107 action in the following situations:

- (1) the property is the chief or the substantial asset of the PRP;
- (2) the property has substantial monetary value;
- (3) there is a likelihood that the defendant owner may file for bankruptcy;
- (4) the value of the property will increase significantly as a result of the removal or

remedial work; or

(5) the PRP plans to sell the property."

Guidance on Federal Superfund Liens, issued September 22, 1987 by EPA's Assistant Administrator for Enforcement and Compliance Monitoring, pages 3-4.

Ms. Knotts' submission provides no financial information, available in March of 1990, that EPA was aware of or should have been aware of, that could support a determination that EPA lacked probable cause to file the lien notice.

CONCLUSION

There was probable cause for EPA to file the lien notice when the notice was filed on March 26, 1990. Ms. Knotts' submission presents no information showing there was not probable cause to file the lien notice, and therefore the Regional Judicial and Presiding Officer recommends that EPA take no action to withdraw the lien notice.

DATE: NOV 10 1993

Benjamin Kalkstein
BENJAMIN KALKSTEIN
Regional Judicial and Presiding Officer